MEDICAL CONTESTED CASE HEARING NO. 09158
M6-09-16849-01

DECISION AND ORDER

This case is decided pursuant to Chapter 410 of the Texas Workers' Compensation Act and Rules of the Division of Workers' Compensation adopted thereunder.

ISSUES

A contested case hearing was held on May 4, 2009, to decide the following disputed issue:

1. Is the preponderance of the evidence contrary to the decision of the Independent Review Organization (IRO) that a lumbar discogram at L2-3, L3-4, L4-5 and L5-S1 is reasonably necessary medical treatment for the compensable injury of _____?

PARTIES PRESENT

Petitioner/Carrier appeared and was represented by BJ, attorney. Respondent/Claimant appeared and was assisted by RH, ombudsman.

BACKGROUND INFORMATION

Claimant sustained a compensable injury on _____, and has undergone conservative care that included injections. Medical imaging revealed disc space narrowing with anterior osteophytes and a right-sided herniated disc at L4-5. In his decision, the IRO physician reviewer noted that medical records also state that there is some nerve root compression seen on the MRI scan compatible with left L5 distribution and the herniation at L4-5 is apparently associated with left L5 weakness and numbness. Conservative care failed to provide any significant benefit. In his report, the IRO physician reviewer stated that Claimant's current doctor, Dr. KB, has stated that Claimant is "more likely a candidate for a lumbar fusion due to the combination of herniations (sic) and significant lumbar pain associated with radiculopathy." Dr. KB requested that Carrier approve lumbar discography at L2-3, L3-4, L4-5 and L5-S1 to determine whether the herniation is the pain generator rather than doing a simple laminectomy. Dr. KB testified that the discogram was also recommended because the Texas Medical Board had sanctioned a doctor in (City), Texas, for failing to order one prior to a spinal fusion.

The IRO physician reviewer, an MD with board certification in orthopedic surgery, overturned Carrier's denial of the requested four-level discography. Carrier then appealed the IRO decision. In a Contested Case Hearing (CCH), the party appealing the IRO decision has the burden of overcoming the decision issued by an IRO by a preponderance of evidence-based medical evidence (Rule 133.308(t)).

In support of its contention that the IRO decision is inconsistent with the Official Disability Guidelines (ODG) and evidence based medicine, Carrier offered several published papers that tangentially discuss discography, the testimony of Dr. T, and excerpts from the ODG. Claimant offered Dr. KB's testimony to bolster the IRO decision and refute Dr. T' testimony.

An employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed (Texas Labor Code §408.021). "Health care reasonably required" is defined as health care that is clinically appropriate and considered effective for the injured employee's injury and provided in accordance with best practices consistent with evidence based medicine or, if evidence based medicine is not available, generally accepted standards of medical practice recognized in the medical community (Texas Labor Code §401.011(22-a)). "Evidence based medicine" means the use of the current best quality scientific and medical evidence formulated from credible scientific studies, including peer-reviewed medical literature and other current scientifically based texts and treatment and practice guidelines (Texas Labor Code §401.011 (18-a)). In accordance with the above statutory guidance, Rule 137.100 directs health care providers to provide treatment in accordance with the current edition of the ODG, and such treatment is presumed to be reasonably required. As noted by Dr. T'', the current edition of the ODG does not recommend discography. In discussing the procedure, the ODG says:

> Not recommended. In the past, discography has been used as part of the pre-operative evaluation of patients for consideration of surgical intervention for lower back pain. However, the conclusions of recent, high quality studies on discography have significantly questioned the use of discography results as a preoperative indication for either IDET or spinal fusion. These studies have suggested that reproduction of the patient's specific back complaints on injection of one or more discs (concordance of symptoms) is of limited diagnostic value. (Pain production was found to be common in non-back pain patients, pain reproduction was found to be inaccurate in many patients with chronic back pain and abnormal psychosocial testing, and in this latter patient type, the test itself was sometimes found to produce significant symptoms in non-back pain controls more than a year after testing.) Also, the findings of discography have not been shown to consistently correlate well with the finding of a High Intensity Zone (HIZ) on MRI. Discography may be justified if the decision has already been made to do a spinal fusion, and a negative discogram could rule out the need for fusion (but a positive discogram in itself would not allow fusion). (Carragee-*Spine*, 2000) (Carragee2-*Spine*, 2000) (Carragee3-*Spine*, 2000) (Carragee4-*Spine*, 2000) (Bigos, 1999) (ACR, 2000) (Resnick, 2002) (Madan, 2002) (Carragee-*Spine*, 2004) (Carragee2, 2004) (Maghout-Juratli, 2006) (Pneumaticos, 2006) (Airaksinen, 2006) Discography may be supported if the decision has already been made to do a spinal fusion, and a negative discogram could rule out the need for fusion on that disc (but a positive discogram in itself would not justify fusion). Discography may help distinguish asymptomatic discs among morphologically abnormal discs in patients without psychosocial issues. Precise prospective categorization of discographic diagnoses may predict outcomes from treatment, surgical or otherwise. (Derby, 2005) (Derby2, 2005) (Derby, 1999) Positive discography was not highly predictive in identifying outcomes from spinal fusion. A recent study found only a 27% success from spinal fusion in patients with low back pain and a positive single-level low-pressure provocative discogram, versus a 72% success in patients having a well-accepted single-level lumbar pathology of unstable spondylolisthesis. (Carragee, 2006) The prevalence of positive discogram may be increased in subjects with chronic low back pain who have had prior surgery at the level tested for lumbar disc herniation. (Heggeness, 1997) Invasive diagnostics such as provocative discography have not been proven to be

accurate for diagnosing various spinal conditions, and their ability to effectively guide therapeutic choices and improve ultimate patient outcomes is uncertain. (Chou, 2008) Although discography, especially combined with CT scanning, may be more accurate than other radiologic studies in detecting degenerative disc disease, its ability to improve surgical outcomes has yet to be proven. It is routinely used before IDET, yet only occasionally used before spinal fusion. (Cohen, 2005) Discography involves the injection of a water-soluble imaging material directly into the nucleus pulposus of the disc. Information is then recorded about the pressure in the disc at the initiation and completion of injection, about the amount of dye accepted, about the configuration and distribution of the dye in the disc, about the quality and intensity of the patient's pain experience and about the pressure at which that pain experience is produced. Both routine x-ray imaging during the injection and post-injection CT examination of the injected discs are usually performed as part of the study. There are two diagnostic objectives: (1) to evaluate radiographically the extent of disc damage on discogram and (2) to characterize the pain response (if any) on disc injection to see if it compares with the typical pain symptoms the patient has been experiencing. Criteria exist to grade the degree of disc degeneration from none (normal disc) to severe. A symptomatic degenerative disc is considered one that disperses injected contrast in an abnormal, degenerative pattern, extending to the outer margins of the annulus and at the same time reproduces the patient's lower back complaints (concordance) at a low injection pressure. Discography is not a sensitive test for radiculopathy and has no role in its confirmation. It is, rather, a confirmatory test in the workup of axial back pain and its validity is intimately tied to its indications and performance. As stated, it is the end of a diagnostic workup in a patient who has failed all reasonable conservative care and remains highly symptomatic. Its validity is enhanced (and only achieves potential meaningfulness) in the context of an MRI showing both dark discs and bright, normal discs -- both of which need testing as an internal validity measure. And the discogram needs to be performed according to contemporary diagnostic criteria -- namely, a positive response should be low pressure, concordant at equal to or greater than a VAS of 7/10 and demonstrate degenerative changes (dark disc) on MRI and the discogram with negative findings of at least one normal disc on MRI and discogram. See also Functional anesthetic discography (FAD).

Discography is Not Recommended in ODG.

Patient selection criteria for Discography if provider & payor agree to perform anyway:

o Back pain of at least 3 months duration

o Failure of recommended conservative treatment including active physical therapy

o An MRI demonstrating one or more degenerated discs as well as one or more normal appearing discs to allow for an internal control injection (injection of a normal disc to validate the procedure by a lack of a pain response to that injection)

o Satisfactory results from detailed psychosocial assessment (discography in subjects with emotional and chronic pain problems has been linked to reports of significant back pain for prolonged periods after injection, and therefore should be avoided)

o Intended as a screen for surgery, i.e., the surgeon feels that lumbar spine fusion is appropriate but is looking for this to determine if it is not indicated (although discography is not highly predictive) (Carragee, 2006) NOTE: In a situation where the selection criteria and other surgical indications for fusion are conditionally met, discography can be considered in preparation for the surgical procedure. However. all of the qualifying conditions must be met prior to proceeding to discography as discography should be viewed as a non-diagnostic but confirmatory study for selecting operative levels for the proposed surgical procedure. Discography should not be ordered for a patient who does not meet surgical criteria.
o Briefed on potential risks and benefits from discography and surgery
o Single level testing (with control) (Colorado, 2001)
o Due to high rates of positive discogram after surgery for lumbar disc herniation, this should be potential reason for non-certification

Dr. KB testified that the procedure he contemplates is consistent with the selection criteria of the ODG because he intends to confirm the need for fusion at L4-5 and the other areas were merely controls. That testimony is inconsistent with his assertion that the discogram would allow him to assure that all symptomatic levels were treated during the proposed fusion of L4-5. Dr. KB further stated that there is an inherent inconsistency in the ODG because it calls for a discogram before performing a fusion and that the Texas Medical Board has impliedly required a discogram before performing fusion surgery by sanctioning a doctor in (City), Texas, for failing to obtain a discogram before performing a fusion surgery.

In determining the weight to be given to expert testimony, a trier of fact must first determine if the expert is qualified to offer it. The trier of fact must then determine whether the opinion is relevant to the issues at bar and whether it is based upon a solid foundation. An expert's bald assurance of validity is not enough. *See* Black vs. Food Lion, Inc., 171 F.3rd 308 (5th Cir. 1999); E.I. Du Pont De Nemours and Company, Inc. v. Robinson, 923 S.W.2d 549 (Tex. 1995).

Dr. KB's opinion that the requested discography at four levels is clinically appropriate is based upon information that has been superseded by more recent studies. His contention that discography is required by the Texas Medical Board is founded upon a presumption that the sanctioning of the doctor in (City) constitutes a finding that discography is always appropriate in the event a spinal fusion is being contemplated. That conclusion is consistent with his assertion that the ODG requires a discogram before a spinal fusion can be recommended, but the low back treatment section of the ODG cites a discogram as only one of the possible studies that could support a determination to perform a spinal fusion in an appropriate case. The reference to a discogram in the fusion guidelines is consistent with the discography section of the treatment guidelines that indicates that a discogram may be appropriately used to rule out the need for fusion at a particular level.

Dr. T noted that discograms were considered the standard of care in the 1990s, but that they have been shown to be of little benefit as a diagnostic tool in more recent studies. Dr. T's testimony is consistent with the current state of evidence based medicine as found in the ODG. Dr. T testified that the physician reviewer incorrectly determined that Claimant met the selection criteria found in the ODG. He also stated that the (Provider)'s Physician's Statement of Provocative Discography relied upon by the physician reviewer is out of date, having been based upon

studies from the 1990s, and is no longer a valid statement of the current, best quality medical evidence.

In light of the provisions of the ODG as set forth above and Dr. T's testimony, the hearing officer finds that the preponderance of the evidence-based medical evidence is contrary to the IRO decision and that the requested multi-level discography is neither clinically appropriate nor provided in accordance with best practices consistent with evidence based medicine. Even though all the evidence presented was not discussed, it was considered. The Findings of Fact and Conclusions of Law are based on all of the evidence presented.

FINDINGS OF FACT

1. The parties stipulated to the following facts:

   A. Venue is proper in the (City) Field Office of the Texas Department of Insurance, Division of Workers' Compensation.

   B. Claimant sustained a compensable injury on _____, while employed by (Employer).

   C. Claimant, by and through Dr. KB, requested approval for a lumbar discogram at L2-3, L3-4, L4-5 and L5-S1.

   D. Carrier denied approval for the requested procedure.

   E. The Texas Department of Insurance appointed (IRO) to act as the independent review organization (IRO).

   F. The IRO overturned Carrier's denial of the lumbar discograms at L2-3, L3-4, L4-5 and L5-S1.

2. Carrier delivered to Claimant a single document stating the true corporate name of Carrier, and the name and street address of Carrier's registered agent, which document was admitted into evidence as Hearing Officer's Exhibit Number 2.

3. Lumbar discograms are not recommended in the current edition of the ODG.

4. Carrier has not agreed that a discogram is necessary.

5. The proposed discogram is not restricted to one level with a control.

6. Dr. KB's request is not intended as a method of ruling out the need for a spinal fusion.

7. A lumbar discogram at L2-3, L3-4, L4-5 and L5-S1 is not reasonably required medical treatment for the compensable injury of _____.

CONCLUSIONS OF LAW

1. The Texas Department of Insurance, Division of Workers' Compensation, has jurisdiction to hear this case.

2. Venue is proper in the (City) Field Office.

3. The preponderance of the evidence is contrary to the decision of IRO that a lumbar discogram at L2-3, L3-4, L4-5 and L5-S1 is reasonably necessary medical care for the compensable injury of _____.

DECISION

The preponderance of the evidence is contrary to the decision of IRO that a lumbar discogram at L2-3, L3-4, L4-5 and L5-S1 is reasonably required medical care for the compensable injury of _____.

ORDER

Carrier is not liable for the benefits at issue in this hearing. Claimant remains entitled to medical benefits for the compensable injury in accordance with §408.021.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

RUSSELL OLIVER, PRESIDENT
TEXAS MUTUAL INSURANCE COMPANY
6210 HWY 290 EAST
AUSTIN, TEXAS 78723

Signed this 5th day of May, 2009.

KENNETH A. HUCHTON
Hearing Officer